LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 16 1968
JOHN F. DAVIS, CLERK

No. 1087

In the Supreme Court of the United States

OCTOBER TERM, 1967

GRAZIANO J. MANCUSO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
MITCHELL ROGOVIN,
Assistant Attorney General,
JOSEPH M. HOWARD,
RICHARD B. SUHRHEINRICH,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1037

GRAZIANO J. MANCUSO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was charged in a five-count indictment in the United States District Court for the District of Maryland with wilful attempted evasion of his income tax for the years 1956 through 1960, in violation of Section 7201 of the Internal Revenue Code of 1954 (Pet. 2). The government's evidence, based upon the net-worth method of proof, showed that petitioner had reported income for these years in amounts ranging from $591—in 1959—to some $6,000—in 1960, whereas his actual income in this period had ranged from a low of $4,709 in 1959 to a high of over $27,000 in 1957. The total understatement over the 5 years was

290-508—68

$52,018.27 (A.A. 232.)[1] A jury found petitioner guilty on all counts, and he was sentenced to serve 183 days imprisonment. The court of appeals affirmed, sitting *en banc*. There is no conflict of decisions or any other matter calling for further review.

1. During the investigation a special agent of the Internal Revenue Service interviewed petitioner in June and December of 1961 (A.A. 46, 60). Before commencing the first interview, which was held in the office of the Internal Revenue Service, the agent advised petitioner of his constitutional right to say nothing and that anything he did say could be used against him in any proceeding, criminal or otherwise (A.A. 53). However, on neither occasion was petitioner advised of his right to counsel. (A.A. 52–53.)[2]

There is no merit to the argument (Pet. 8–16) that the use at trial of information given during these interviews was improper under *Escobedo* v. *Illinois*, 378 U.S. 478, and other cases, which have rested on *Miranda* v. *Arizona*, 384 U.S. 436. *Miranda* applies only to cases tried after the date of that decision, June 13, 1966. *Johnson* v. *New Jersey*, 384 U.S. 719.

[1] The designation "A.A." refers to the Appellant's Appendix in the court below.

[2] The court below was under the misapprehension that petitioner was accompanied by counsel when first interviewed. Actually it was his brother who was so represented (A.A. 48–49), petitioner being accompanied by a certified public accountant (A.A. 52). The result reached below should not, however, depend upon the assumption that petitioner was represented by counsel. Both petitioner and the United States made clear the correct facts in the papers filed pursuant to the court of appeals' *en banc* rehearing of the decision of the panel whose opinion contains the misstatement.

The case at bar was tried prior to that date. Moreover, as the court below held (Pet. 36), *Escobedo* and *Miranda* do not "suggest a duty to warn one who, like the defendant, is *not* under arrest and whose freedom of action is not curtailed." (Emphasis in original.) Petitioner was not in custody or deprived of his freedom in any way, and therefore was not subject to the kind of compulsion that the rules of *Miranda* were designed to prevent. The courts of appeals in six other circuits agree that the *Miranda* warning is not required in such a case. *Schlinsky* v. *United States*, 379 F. 2d 735 (C.A. 1), certiorari denied, 389 U.S. 920; *Thomas* v. *United States*, 370 F. 2d 96 (C.A. 5), certiorari denied, 386 U.S. 975;[3] *United States* v. *Maius*, 378 F. 2d 716, 718–719 (C.A. 6), certiorari denied, 389 U.S. 905; *United States* v. *Mansfield*, 381 F. 2d 961 (C.A. 7), certiorari denied, December 18, 1967, No. 723, this Term; *Frohmann* v. *United States*, decided July 27, 1967, 20 A.F.T.R. 2d 5244 (C.A. 8), certiorari denied, December 4, 1967, No. 644, this Term; *Kohatsu* v. *United States*, 351 F. 2d 898 (C.A. 9), certiorari denied, 384 U.S. 1011.[4]

[3] Although this issue is not discussed in the Fifth Circuit's *per curiam* opinion, it is evident from Mr. Justice Douglas' dissent from the denial of certiorari in *Thomas* that the question was raised in the case. Cf. *Evans* v. *United States*, 377 F. 2d 535 (C.A. 5).

[4] *United States* v. *Schoenburg*, 19 A.F.T.R. 2d 348 (D. Ariz.), and *United States* v. *Turzynski*, 268 F. Supp. 847 (N.D. Ill.), on which petitioner relies (Pet. 10, 11, 13, 14–15), have been discredited by appellate decisions in their circuits. The weight of district court opinion agrees with the views expressed in the courts of appeals. See *United States* v. *Gleason*, 265 F. Supp. 880 (S.D.N.Y.); *United States* v. *Fiore*, 258 F. Supp. 435, 440

2. There is no merit in the argument (Pet. 8–13) that the agents violated petitioner's constitutional rights by failing to advise him that he was the subject of a criminal investigation. No such warning is necessary in the circumstances presented here. *United States* v. *Sclafani*, 265 F. 2d 408, 414–415 (C.A. 2), certiorari denied, 360 U.S. 918; *Turner* v. *United States*, 222 F. 2d 926, 931 (C.A. 4), certiorari denied, 350 U.S. 831; *United States* v. *Frank*, 245 F. 2d 284, 285–286 (C.A. 3), certiorari denied, 355 U.S. 819; *Montgomery* v. *United States*, 203 F. 2d 887, 892–893 (C.A. 5); *Hanson* v. *United States*, 186 F. 2d 61, 64–65 (C.A. 8); cf. *Lewis* v. *United States*, 385 U.S. 206, 209–211; *Hoffa* v. *United States*, 385 U.S. 293, 300–303.

3. Petitioner's argument (Pet. 16–24) that he is entitled to a dismissal of the indictment arises from what occurred when the Assistant United States Attorney charged with the duty of trying the case, while preparing for trial, interviewed Duke, the account-

(W.D. Pa.); *United States* v. *Hill*, 260 F. Supp. 139 (S.D. Cal.); *United States* v. *Carlson*, 260 F. Supp. 423 (E.D.N.Y.); *Moon* v. *Brennan* (E.D. Wis.), decided November 21, 1966, 19 A.F.T.R. 2d 641; *Stern* v. *Robinson*, 262 F. Supp. 13 (W.D. Tenn.); *United States* v. *Bachman*, 267 F. Supp. 593 (W.D. Pa.); *United States* v. *Neves*, 269 F. Supp. 158 (S.D.N.Y.); *United States* v. *Basil*, 268 F. Supp. 1018 (S.D. Fla.); *Bohrod* v. *United States*, (W.D. Wis.), decided December 14, 1965, 67–2 USTC, par. 9622. *United States* v. *Gower*, 271 F. Supp. 655 (M.D. Pa. 1967), is to the contrary, but the Third Circuit has not yet had occasion to consider the question.

Petitioner is mistaken in the assertion (Pet. 15–16) that the issues presented in this case are the same or similar to those pending in *Mathis* v. *United States*, 376 F. 2d 595 (C.A. 5), certiorari granted, 389 U.S. 896.

ant who prepared petitioner's tax returns (A.A. 113). Osborn requested Duke to bring his papers relating to petitioner. Among the papers Duke brought in were net-worth statements and other financial statements (A.A. 189–216) that he had prepared for defense counsel (A.A. 123, 220). Duke voluntarily gave Osborn the file containing the papers. Although Osborn read and copied the documents, he immediately advised defense counsel of the circumstances (A.A. 220–221).[5] Upon motion of the defense, the court ruled that the documents were privileged because they had been made for counsel in preparation for trial (A.A. 222) and suppressed them (A.A. 189–216) together with "any evidence that might have been revealed by those papers" (A.A. 11). The court further directed the return of the papers to petitioner. It rejected, however, the defense contention that dismissal of the indictment was the proper remedy (Pet. 47–48). At trial no objection was made on the ground that some part of the government's case was the fruit of Osborn's examination of Duke's file.

The only question before the court of appeals and here is whether the indictment should have dismissed and further prosecution forbidden. The court below, on rehearing *en banc*, while saying that the government "expressly disclaimed wrongful intent in what

[5] Osborn was under the impression that these net-worth statements had already been presented by the defense to an attorney in the Department of Justice in Washington (A.A. 220–221). Although the defense denied this (A.A. 222), the government's appendix in the court below (pp. 29–30) contains an affidavit by the Department attorney that he had seen them during a conference with defense counsel.

it did, and candidly admitted an extreme, even stupid, error of judgment," the court concluded unanimously that "[n]evertheless, we are persuaded that in this case wrongful intent was absent. Except for such absence and the lack of substantial prejudice, we would dismiss the prosecution and discharge the defendant under our supervisory power over the district courts of this circuit." (Pet. 38.)[6] This disposition was proper, for the conduct of the prosecutor should not operate to clothe petitioner with immunity. Notably, the cases on which petitioner relies (Pet. 18, 21, 22, 23) granted a new trial[7] rather than dismissal of the prosecution. The rationale of these cases is summed up in *United States* v. *Blue,* 384 U.S. 251, 255:

> Our numerous precedents ordering the exclusion of such illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the

[6] Petitioner errs in the statement (Pet. 8) that Osborn argued the case on rehearing and "'persuaded' the Court that 'wrongful intent was absent.'" Osborn argued only the point raised below and not reasserted here that the government had not made proper use of the net-worth method in computing the unreported income. The points involved in the petition for a writ of certiorari were argued by Assistant United States Attorney Goetz.

[7] Because the prosecutor's error resulted in an order to suppress before trial, a second trial, which has not been sought, would not provide petitioner any additional relief.

ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book.

Thus the courts below handled this unfortunate incident in a manner consonant with petitioner's rights and the public interest.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
MITCHELL ROGOVIN,
Assistant Attorney General.
JOSEPH M. HOWARD,
RICHARD B. BUHRMAN,
Attorneys.

FEBRUARY 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968